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## Intentional Torts

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### *Intentional torts*

Recent changes to Article 14 of the CPLR concerning contribution among joint tortfeasors<sup>380</sup> have raised speculation as to the applicability of *Dole* apportionments to the area of intentional torts.<sup>381</sup> Historically, one of the primary purposes in denying contribution among tortfeasors was to deter willful misconduct.<sup>382</sup> The bar on contribution stood as a warning to tortfeasors that the injured party could recover his total judgment against any one of them, with no recourse by the chosen defendant against his fellow tortfeasors.<sup>383</sup> The harshness of this rule was mitigated somewhat by the development of the active-passive distinction in indemnification suits. Under this doctrine, the liability of a vicariously liable tortfeasor is shifted totally to the actual wrongdoer.<sup>384</sup> Under the former CPLR 1401,<sup>385</sup> pro rata contribution among defendants was made permissible where the plaintiff joined more than one defendant in the action. More recently, *Dole v. Dow Chemical Co.*<sup>386</sup> introduced the concept of allocating damages among joint negligent tortfeasors according to their relative culpability.<sup>387</sup>

<sup>380</sup> CPLR 1401 now provides in part that

two or more persons who are subject to liability for damages for the same personal injury, injury to property or wrongful death, may claim contribution among them whether or not an action has been brought or a judgment has been rendered against the person from whom contribution is sought.

<sup>381</sup> See 7B MCKINNEY'S CPLR 1401, supp. commentary at 184 (1974), wherein Dean Joseph M. McLaughlin notes that "nothing in the statute [CPLR 1401 as amended] bars contribution between intentional tortfeasors." See also Murphy, *Dole v. Dow Chemical, Thoughts About the Future*, N.Y.S.B. Ass'n J. INS. NEG. & COMP. SECTION, Fall 1972, at 17, 20-21 [hereinafter cited as Murphy].

<sup>382</sup> See W. PROSSER, LAW OF TORTS 305 (4th ed. 1971) [hereinafter cited as PROSSER]. See generally Leflar, *Contribution and Indemnity Between Tortfeasors*, 81 U. PA. L. REV. 130 (1932). The common law rule against contribution had its origin in *Merryweather v. Nixan*, 101 Eng. Rep. 1337 (K.B. 1799). Dean Prosser concludes that the rationale underlying the *Merryweather* decision was that a party who acted intentionally and in concert with another could not rest a claim for contribution "upon what was, in the eyes of the law, entirely his own deliberate wrong." PROSSER at 305. Early New York cases adopted the rule against contribution where willful misconduct was present. *Id.* at 306 & n.45, citing *Miller v. Fenton*, 11 Paige Ch. 18 (N.Y. Ct. Ch. 1844); *Peck v. Ellis*, 2 Johns. Ch. 130 (N.Y. 1816).

<sup>383</sup> See 7B MCKINNEY'S CPLR 3019, commentary at 296-97 (1974). See also 2A WK&M ¶ 1401.04.

<sup>384</sup> See PROSSER, *supra* note 382, at 310-11.

<sup>385</sup> Ch. 388, § 5, [1964] N.Y. Laws 1256, *repealed*, ch. 742, § 1, [1974] N.Y. Laws 1153 (McKinney). Under the new CPLR 1401, there is no requirement that the plaintiff join all defendants in the action, before a claim for contribution will lie. Moreover, contribution is to be computed according to relative culpability rather than pro rata apportionment. See note 380 *supra*.

<sup>386</sup> 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972).

<sup>387</sup> *Id.* at 153, 282 N.E.2d at 295, 331 N.Y.S.2d at 391-92. In *Dole*, the Court of Appeals stated that the right to an apportionment of liability among joint tortfeasors should depend upon their "relative responsibility" for the injury suffered by the plaintiff. *Id.* It

Subsequent decisions considering the applicability of *Dole* to intentional misconduct have not been uniform in result.<sup>388</sup> In *Goswami v. H & D Construction Co.*,<sup>389</sup> the Supreme Court, Steuben County, was faced with the novel question of whether the *Dole* principle should be extended to an action for trespass. Plaintiff commenced separate trespass and nuisance actions against H & D Construction Co. and the City of Hornell. The suit against the defendant construction company was the result of its entry upon plaintiff's land, pursuant to a contract with the city, to reconstruct a municipally owned thoroughfare. Plaintiff proceeded against the city on the theory that the defendant construction company was the city's agent when it entered plaintiff's property. Thereafter, the defendant contractor commenced a third-party action seeking contribution from the defendant city in the event that plaintiff obtained a judgment against it. Justice Wightman, in granting the city's motion to dismiss the third-party complaint for failure to state a cause of action, held that intentional tortfeasors were not entitled to seek *Dole* apportionments.<sup>390</sup> In the court's view, the *Dole* rule applies only to suits against tortfeasors charged with negligence.<sup>391</sup>

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should be observed that the *Dole* Court never reached the issue of the application of the contribution doctrine to intentional tortfeasors. Rather, it restricted its holding to joint tortfeasors "causing damage by negligence." 30 N.Y.2d at 153, 282 N.E.2d at 295, 331 N.Y.S.2d at 391.

<sup>388</sup> Compare *Herzfeld v. Lavenhol, Krekstein, Horwath & Horwath*, 378 F. Supp. 112 (S.D.N.Y. 1974), and *Slotkin v. Brookdale Hosp. Center*, 377 F. Supp. 275 (S.D.N.Y. 1974), with *Goswami v. H & D Constr. Co.*, 78 Misc. 2d 99, 355 N.Y.S.2d 922 (Sup. Ct. Steuben County 1974).

Professor David D. Siegel has stated that although the traditional bar to contribution among joint tortfeasors continues to have some validity in the area of intentional torts, it may be appropriate to discard that principle and permit contribution in such cases. 7B MCKINNEY'S CPLR 3019, commentary at 297 (1974). Through the inclusion of intentional torts within the *Dole* rule, Professor Siegel foresees two positive results. First, considerations of deterrence and punishment would reside solely with the criminal law. *Id.* Presumably, the advantage to be gained by such a shift in responsibility stems from the belief that the criminal law, traditionally concerned with willful misbehavior, is the appropriate instrument to deal with deterrence of intentional misconduct, whether it be joint or individual. Second, it would eliminate the difficulty often encountered in determining whether the conduct complained of was intentional or not. *Id.*

Another commentator, Dean John J. Murphy, has suggested that since joint tortfeasors who are responsible for an intentional tort need not be equally culpable, it would be appropriate to extend *Dole* to suits based upon intentional torts. Murphy, *supra* note 381, at 20-21. Moreover, he argues that juries could determine, without undue difficulty, the relative culpability of joint tortfeasors in suits arising from intentional torts. *Id.*

<sup>389</sup> 78 Misc. 2d 99, 355 N.Y.S.2d 922 (Sup. Ct. Steuben County 1974).

<sup>390</sup> *Id.* at 102, 355 N.Y.S.2d at 926.

<sup>391</sup> *Id.* In reaching its holding, the court stated:

It is the opinion of this court that the rationale of the Dow Chemical ruling is limited to cases where apportionment of responsibility between negligent joint or concurrent tortfeasors is to be determined. In the instant case the wrongs alleged . . . are of an intentional nature for which each of the defendants is

In contrast to the *Goswami* holding, two recent decisions in the United States District Court for the Southern District of New York have concluded that the *Dole* rule should be extended to intentional torts. The first of these cases, *Sloikin v. Brookdale Hospital Center*,<sup>392</sup> involved a fraud action wherein plaintiffs alleged that as a result of the misrepresentations of the defendant insurance carriers as to the coverage of the defendant hospital's liability insurance policy, they were induced to settle their malpractice action against the hospital. In addition to the hospital and insurance carriers, named as defendants were several executive officers of the hospital and representatives of the insurance carriers. Two of the individual defendants moved to amend their answers to include cross-claims for indemnification against the hospital, characterizing themselves as mere conduits of information supplied by the hospital. The defendant hospital opposed the motion, arguing that in New York there is no right to contribution in a fraud action.<sup>393</sup> Rejecting this contention, the district court permitted the defendants to enter cross-claims against the hospital.<sup>394</sup> Citing the expansion of *Dole* into areas other than ordinary negligence,<sup>395</sup> Judge Connor concluded that there was no plausible reason to deny the application of *Dole* to suits based upon intentional misconduct.<sup>396</sup> In so holding, the court noted that two New York commentators, Professor David D. Siegel and Dean John J. Murphy, had suggested such an extension of *Dole*.<sup>397</sup>

In another decision by the Southern District, *Herzfeld v. Laven-thol, Krekstein, Horwath & Horwath*,<sup>398</sup> two purchasers of securities

jointly answerable and upon which no legal basis for indemnity . . . has been asserted.

*Id.*

<sup>392</sup> 377 F. Supp. 275 (S.D.N.Y. 1974).

<sup>393</sup> Although the court did not indicate what cases the defendant hospital relied upon to support its contention, it did characterize the authorities cited by the hospital as "no longer good law," in light of *Dole*. *Id.* at 278.

<sup>394</sup> *Id.* at 280.

<sup>395</sup> *Id.* at 279, citing *Kelly v. Diesel Constr. Div. of Carl A. Morse, Inc.*, 35 N.Y.2d 1, 315 N.E.2d 751, 358 N.Y.S.2d 685 (1974) (statutory liability); *Langer v. Eschwege*, 39 App. Div. 2d 653, 332 N.Y.S.2d 16 (1st Dep't 1972) (attorney malpractice); *Walsh v. Ford Motor Co.*, 70 Misc. 2d 1031, 335 N.Y.S.2d 110 (Sup. Ct. Nassau County 1972) (breach of implied warranty).

<sup>396</sup> 377 F. Supp. at 279-80. In its opinion, the court stated that "the applicability of the *Dole* doctrine to intentional torts has not been considered by the New York courts . . . ." *Id.* at 279. Apparently, the court was unaware of the decision one month earlier in *Goswami v. H & D Constr. Co.*, 78 Misc. 2d 99, 355 N.Y.S.2d 922 (Sup. Ct. Steuben County 1974).

<sup>397</sup> 377 F. Supp. at 279-80, citing 7B MCKINNEY'S CPLR 3019, commentary at 297 (1974); Murphy, *supra* note 381, at 17, 20-21. See generally note 381 *supra*.

<sup>398</sup> 378 F. Supp. 112 (S.D.N.Y. 1974).

brought a fraud action, based upon both federal and state law, against the defendant accounting firm.<sup>399</sup> Plaintiffs alleged that the defendant had misrepresented data contained in financial reports that it had prepared for the issuer of the securities, a Delaware corporation involved in real estate syndications. Thereafter, defendant commenced a third-party action against an investment banking firm and one of the firm's officers, charging that the third-party defendants had exaggerated the value of the issuer's property in communications with it. Judge MacMahon held that the defendant accounting firm was entitled to contribution from the investment firm.<sup>400</sup> The court deemed this result necessary, in order that "the deterrent effect of the judgment [would] be felt by all culpable parties."<sup>401</sup> Unfortunately, the court devoted little of its attention to the contribution issue. More particularly, it failed to explore the possible distinctions, for the purpose of permitting the relative allocation of fault among joint tortfeasors, between negligence suits and actions based upon intentional misconduct.<sup>402</sup>

While it remains to be seen how the courts will interpret the recent revisions to Article 14, the better approach would appear to favor its application to actions based upon intentional misconduct. The revisions merely reflect a codification of the *Dole* principle,<sup>403</sup> and *Slothin* and *Herzfeld* offer the practitioner support for the conclusion that *Dole* applies to intentional as well as negligent torts. Moreover, the Judicial Conference Report accompanying the changes expressly points out that "[t]he section is not limited to unintentional

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<sup>399</sup> Suit was brought under section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (1970); rule 10b-5 promulgated thereunder, 17 C.F.R. § 240.10b-5 (1974); the New York Blue Sky Law, N.Y. GEN. BUS. LAW § 352-c (McKinney 1968); and the common law. 378 F. Supp. at 117.

<sup>400</sup> 378 F. Supp. at 135-36. However, the Southern District held that the proper measure of contribution would be pro rata sharing, rather than relative allocation of fault. The court concluded that under the facts of the case, pro rata contribution would be simpler and more expedient to calculate. *Id.* at 136. In addition, the third-party claim against the officer of the accounting firm was dismissed by the court. *Id.* at 133.

<sup>401</sup> The third-party defendant was found liable under section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78 (1970), rule 10b-5 promulgated thereunder, 17 C.F.R. § 240.10b-5 (1974), and common law fraud. 378 F. Supp. 130-35.

<sup>402</sup> Apparently, the *Herzfeld* court would permit contribution whether a suit is based upon negligence or intentional misconduct. See 378 F. Supp. at 130-36. Before the *Herzfeld* decision, a *Dole* claim based upon the breach of a statutory duty had been permitted by the Appellate Division, First Department, in *Kelly v. Diesel Constr. Div. of Carl A. Morse*, 42 App. Div. 2d 891, 347 N.Y.S.2d 698 (1st Dep't 1973) (mem.), *aff'd*, 35 N.Y.2d 1, 315 N.E.2d 751, 358 N.Y.S.2d 685 (1974). The court did not cite this case in its opinion. Moreover, *Goswami*, decided one month before *Herzfeld*, was not mentioned in the *Herzfeld* decision, presumably because the court was unaware of its existence.

<sup>403</sup> TWELFTH ANNUAL REPORT OF THE JUDICIAL CONFERENCE TO THE LEGISLATURE ON THE CPLR, appearing in 2 N.Y. Sess. Laws 1803 (McKinney 1974).

tortfeasors."<sup>404</sup> The Conference Report suggested that since contribution between active intentional tortfeasors joined in an action was not prohibited under the former CPLR 1401, there is no absolute policy bar to contribution in the area of intentional torts.<sup>405</sup> Accordingly, it would seem that there is no justifiable reason for limiting contribution to unintentional torts.

### *Retroactivity*

The Court of Appeals, in *Kelly v. Long Island Lighting Co.*,<sup>406</sup> extended the applicability of *Dole* to any litigation pending on the date of that decision.<sup>407</sup> As a result of the subsequent liberal interpretation of *Kelly* by lower courts, defendants have asserted their rights to a *Dole* apportionment at various stages of litigation.<sup>408</sup> Even where the main action was tried pre-*Dole* and no claim for apportionment was asserted until the appellate level, courts have deemed such cases still pending and have remanded them for apportionment of damages among joint tortfeasors.<sup>409</sup>

<sup>404</sup> *Id.* at 1806.

<sup>405</sup> *Id.* The report acknowledged that the Revised Uniform Contribution Among Tortfeasors Act does not permit contribution among intentional tortfeasors, but found unpersuasive the reasons offered therein for such a prohibition. *Id.*, citing UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 1(c) & Comment (rev. 1955).

<sup>406</sup> 31 N.Y.2d 25, 286 N.E.2d 241, 334 N.Y.S.2d 851 (1972).

<sup>407</sup> *Kelly* involved an appeal by an active tortfeasor from the dismissal of his cross-complaint. Between the time of the original dismissal and the appeal, *Dole* was decided. The Court of Appeals reinstated the cross-complaint, stating, "We, of course, . . . give effect to the law as it exists at the time of our decision." *Id.* at 29 n.3, 286 N.E.2d at 243 n.3, 334 N.Y.S.2d at 854 n.3. See also *Rodgers v. Dorchester Associates*, 32 N.Y.2d 553, 300 N.E.2d 403, 347 N.Y.S.2d 22 (1973); *Frey v. Bethlehem Steel Corp.*, 30 N.Y.2d 764, 284 N.E.2d 579, 333 N.Y.S.2d 425 (1972).

<sup>408</sup> For a discussion of *Dole's* application to pending cases, see 3 WK&M ¶ 3019.62; Tymann & Samore, *Torts*, in 1973 *Survey of New York Law*, 25 SYRACUSE L. REV. 433, 433-34 (1974); Note, *Dole v. Dow Chemical Co.: Recent Developments*, 48 ST. JOHN'S L. REV. 195, 202-03 (1973); Note, *Dole v. Dow Chemical Co.: Recent Developments*, 47 ST. JOHN'S L. REV. 759-60 (1973).

<sup>409</sup> See *Stein v. Whitehead*, 40 App. Div. 2d 89, 92, 337 N.Y.S.2d 821, 826 (2d Dep't 1972), wherein the appellate court, in an action commenced prior to *Dole*, noted that "even in the absence of a cross-claim I think the trial court should, *sua sponte*, charge the jury that it should determine the proportionate responsibility of each defendant. . . ." Similarly, in *Brown v. City of New York*, 40 App. Div. 2d 785, 337 N.Y.S.2d 685 (1st Dep't 1972), the First Department apportioned damages among joint tortfeasors despite a prior pre-*Dole* dismissal of the third-party complaint. In *Liebman v. County of Westchester*, 41 App. Div. 2d 756, 341 N.Y.S.2d 567 (2d Dep't 1973), the court, in granting apportionment, noted that the plaintiff's recovery would be temporarily delayed but considered this to be of minor significance as compared with the predominant consideration of "fairness in the judicial management of the case." *Id.* at 757, 341 N.Y.S.2d at 570, quoting *Dole v. Dow Chem. Co.*, 30 N.Y.2d 143, 153, 282 N.E.2d 288, 295, 331 N.Y.S.2d 382, 391 (1972). Absent apportionment, the possibility of prejudice can be far greater to the joint tortfeasors.

However, the Court of Appeals, in *Codling v. Paglia*, 32 N.Y.2d 330, 298 N.E.2d 622, 345 N.Y.S.2d 461 (1973), discussed in *The Survey*, 48 ST. JOHN'S L. REV. 202 (1973), refused